

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Sections 11 and 13)
of the Cable Television Consumer)
Protection and Competition Act of 1992)

MM Docket No. 92-264

Horizontal and Vertical Ownership)
Limits, Cross-Ownership Limitations)
and Anti-Trafficking Provisions)

LIBERTY MEDIA CORPORATION'S REQUEST FOR
LEAVE TO FILE REPLY IN EXCESS OF PAGE LIMITATION

Liberty Media Corporation ("Liberty Media") hereby respectfully requests leave to exceed the ten-page limit set forth in Section 1.429(g) of the Commission's Rules with respect to its Reply to the Comments on Petition for Reconsideration filed by Viacom International Inc. ("Viacom") on February 14, 1994 ("Reconsideration Comments"). A copy of Liberty's fourteen page Reply, which was filed yesterday, is attached hereto.

Although characterized as "Comments" on the Petition for Reconsideration filed by the Center for Media Education and Consumer Federation of America ("CME/CFA"), Viacom's Reconsideration Comments essentially seek reconsideration of the Commission's Second Report and Order, MM Docket No. 92-264 (rel. Oct. 22, 1993) and imposition of severely

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restrictive horizontal ownership and channel occupancy limits. Viacom's Reconsideration Comments represent a substantial departure from its comments throughout this proceeding. In light of Viacom's reversal of position, Liberty Media was compelled to document fully the multiple inconsistencies between Viacom's current arguments in favor of imposing excessive structural regulations on other cable operators and its prior statements in seeking to avoid application of the same regulations to Viacom. Liberty Media was unable to accomplish that task in fewer than fourteen pages given the time constraints imposed by the Commission's Rules.¹

Liberty Media respectfully requests that the Commission grant leave to exceed the page limit and accept its Reply to Viacom's Reconsideration Comments.

February 25, 1994

Respectfully submitted,


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¹ Although Viacom's Reconsideration Comments make several references to Tele-Communications, Inc. ("TCI") and Liberty Media, including references to the proposed merger between TCI and Liberty Media and to Viacom's pending lawsuit against TCI, Liberty Media and others, Viacom served TCI but did not serve Liberty Media.

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REPLY OF LIBERTY MEDIA CORPORATION

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SUMMARY

Viacom's comments in "partial support" of the Petition for Reconsideration filed by the Center for Media Education and the Consumer Federation of America ("CME/CFA") represent a complete reversal of the previous positions consistently taken by Viacom throughout this proceeding. Viacom previously filed four prior sets of comments in which it consistently opposed adoption of a 20% channel occupancy limit and did not even mention horizontal ownership limits. In a stunning reversal of these positions, Viacom now urges the Commission to "reduce its national horizontal ownership limit to 15%" and to impose a 20% channel occupancy limit on any cable operator "reaching at least 15% of all homes passed nationwide."

Throughout this proceeding, Viacom consistently claimed that channel occupancy limits were "unnecessary" and "anticompetitive." When other parties to the proceeding suggested that all cable operators should be subject to a 20% channel occupancy limit, Viacom claimed that such an "excessive" limit would "ultimately undermine the financial viability" of affiliated programming services, deter investment in new programming services, and infringe upon the First Amendment rights of cable operators. However, when their application is limited to cable operators other than Viacom, these same channel occupancy limits become "especially compelling" to Viacom and their negative consequences suddenly become irrelevant.

Viacom also completely reverses course with respect to horizontal ownership limits. None of Viacom's prior submissions in this proceeding even suggested that horizontal ownership limits were necessary or appropriate. Now, in seeking even more draconian limits than those proposed by CME/CFA, Viacom ignores other "overlapping regulations" adopted by the Commission to promote competition and diversity. Viacom also ignores the substantial record evidence relied upon by the Commission in establishing a 30% horizontal limit. Instead, Viacom relies upon the unsupported claim that new programming services require at least 40 million subscribers to survive, a claim which is directly contradicted by the record evidence in this proceeding.

In short, Viacom has offered no explanation its sudden change of position in this proceeding and no justification for reconsideration of the Commission's ownership and channel occupancy regulations.

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REPLY OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty Media") hereby replies to the Comments on Petition for Reconsideration ("Reconsideration Comments") filed by Viacom International, Inc. ("Viacom") on February 14, 1994. In a startling reversal of its earlier positions in this proceeding, Viacom's Reconsideration Comments offer "partial support" for the Petition for Reconsideration filed by the Center for Media Education and the Consumer Federation of America ("CME/CFA Petition") and seek to impose draconian horizontal ownership and channel occupancy limits, apparently in order to advance its commercial and litigation interests.¹

Viacom now advocates restrictive structural regulations without regard to its own prior representations in this proceeding -- representations which cannot be reconciled

¹ The principal target of Viacom's Reconsideration Comments is Tele-Communications, Inc. ("TCI"), with which Liberty Media has proposed to merge. See Reconsideration Comments at 9-20.

with its current arguments. Channel occupancy limits which Viacom previously labeled "unconstitutional," "unnecessary," "excessive," "contrary to the public interest," and "anti-competitive" when potentially applicable to Viacom suddenly have become "especially compelling" if applied to others. Likewise, after making no suggestion that horizontal ownership limits were necessary or appropriate in four sets of comments, Viacom now wholeheartedly seeks their adoption. Because only two things have changed since Viacom's prior comments were filed -- Viacom has acquired Paramount and filed an antitrust suit against TCI, Liberty Media, and others -- it appears to Liberty Media that Viacom's current Reconsideration Comments are a belated and unfounded effort to gerrymander the Commission's regulations in order to gain commercial advantage and to gain leverage over an opposing party in litigation.²

I. Viacom Now Endorses Channel Occupancy Limits Which It Correctly Labeled As "Unconstitutional," "Excessive," "Unnecessary" And "Anticompetitive."

After opposing without qualification the 20 percent channel occupancy limit proposed by the Association of Independent Television Stations ("INTV") in this proceeding,

² Under the guise of "commenting" on the CME/CFA Petition, Viacom actually seeks untimely reconsideration of the horizontal ownership rules and imposition of even more restrictive rules than CME/CFA had proposed. Viacom has failed to comply with Section 1.429(b) of the Commission's Rules by utterly failing to present "facts...which have occurred...since the last opportunity to present them to the Commission" or to explain why it "could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity."

Viacom now urges the Commission to adopt the same limit for all "cable operators whose level of horizontal ownership is equal to or greater than 15 percent." Reconsideration Comments at 15-16. Viacom previously characterized the INTV proposal as "overly restrictive" and attacked INTV for seeking "not to enhance either consumer welfare or competition but... to remove a bidder from the program acquisition marketplace" by eliminating "entirely a cable operator's ability to participate in programming ventures." Viacom Further Reply Comments, filed May 12, 1993 ("May 12 Comments"), at 4, 7-8. Viacom then explained that the channel occupancy limits it now seeks "could ultimately undermine the financial viability of the program service" through "forced reduction in the number of subscribers" to the service and interference "with the ability of a program service to honor contracts with program suppliers" and advertisers. Viacom Comments, filed Feb. 9, 1993 ("February 9 Comments"), at 10.

Like INTV before it, Viacom provides no factual support for its proposal. For example, Viacom now claims that, absent a 20 percent occupancy limit, TCI would use its "monopoly positions in local markets to favor [its] own programming services at the expense of unaffiliated programmers." Reconsideration Comments at 18. Yet, just one year ago, Viacom argued that a 20 percent channel occupancy limit was unwarranted because "there is scant evidence, if any, that cable operators have ever favored services with which they are

affiliated over unaffiliated program services." February 9 Comments at 7 n.11 (emphasis added).

Similarly, Viacom now claims that, absent a 20 percent channel occupancy limit, TCI will engage in "monopoly leveraging" to "eliminate or severely impair competition to its own affiliated programming services, ultimately to the detriment of cable subscribers." Reconsideration Comments at 17. Yet, less than a year ago, Viacom rejected this same theoretical leverage argument, pointing instead to the real harm threatened by its proposal:

Not only does INTV fail to offer any evidence to support its speculative claim that "cable can use its leverage to prevent development of new, independent program sources," but there is no guarantee that others will step in and fill the role of fostering new program services that, to date, has primarily been filled by cable operators. Indeed, the record is replete with instances in which fledgling program services, rejected by others, turned to the cable industry to provide them with needed financial resources.

May 12 Comments at 11 (emphasis added).³

³ Liberty Media notes with some degree of irony that, just two days after Viacom filed its Reconsideration Comments expressing its new-found concern over TCI's alleged market power, Viacom executives appeared before a national television audience and described Viacom in the wake of the Paramount acquisition as "a giant media powerhouse...of unparalleled proportions in the entire entertainment industry." The combination of Blockbuster, Viacom and Paramount "winds up as the largest customer of Hollywood, [would] buy about \$2 billion worth of film rights a year -- will be the largest customer of the record companies...will be clearly the largest television production and distribution company in the world" and will have a publishing operation that "is one of the most formidable in the world." NBC Today Show Interview with Viacom Chairman Sumner Redstone and President and Chief Executive Officer Frank Biondi, Jr. (Feb. 16, 1994).

In each of its comments and reply comments in this proceeding, Viacom warned that "restricting the right of a cable operator to choose the programming it wishes to distribute raises serious First Amendment questions." February 9 Comments at 2.⁴ Viacom concluded that, in view of Section 12 of the 1992 Cable Act and the must-carry, PEG and leased access requirements, any channel occupancy limit "that would deprive a cable operator of the ability to program a majority of its capacity would, by definition, be excessive." August 23 Comments at ii. Apparently, Viacom now believes that the First Amendment should be suspended for cable operators reaching 15 percent or more of homes passed nationwide, their affiliated programmers, and their customers.

II. Viacom Now Urges The Commission To Adopt Horizontal Ownership Limits -- Contrary To Its Prior Comments And Without Factual Support.

A. Viacom's Claim That The Commission Should Ignore The Impact Of Its Other Regulations Contradicts Its Prior Arguments And Analysis.

At the outset, Viacom contends that "[t]here is no evidence in the 1992 Cable Act or its legislative history that

⁴ See also May 12 Comments at ii ("the Commission must consider the First Amendment implications of channel occupancy limits...[and] should afford cable operators broad latitude to select and carry programming of their own choosing"); Viacom Comments, filed Aug. 23, 1993 ("August 23 Comments"), at 1-2 (urging "the Commission to recognize the direct infringement on speech that flows from the imposition of any channel occupancy limit" and to "give cable operators the broadest possible discretion to select programming of their own choosing"); Viacom Reply Comments, filed Sept. 3, 1993 ("September 3 Comments"), at 1 (urging the Commission to minimize "the infringement upon important constitutional rights that flow directly from channel occupancy limits").

Congress intended the FCC to calibrate its horizontal ownership limit in accordance with the perceived but heretofore undemonstrated effectiveness of other sections of the 1984 and 1992 Cable Acts...." Reconsideration Comments at 5. This argument just does not square with its prior acknowledgment that the other Commission rulemakings would affect both the horizontal ownership and channel occupancy rules adopted in this proceeding:

Because the Commission recognized that the manner in which it implemented certain other aspects of the 1992 Cable Act, particularly the Act's program access and leased access provisions, would have a bearing on the manner in which it implemented Section 11 of the Act, the Commission, by Order, DA 93-233 (rel. Feb. 26, 1993), extended the time for filing reply comments in this proceeding for issues relating to Channel Occupancy Limits, Subscriber Limits and Participation in Program Production.

May 12 Comments at 1.

Alternatively, Viacom claims that "it is difficult to see how these other sections will have any impact whatsoever on the types of behavior which the FCC's horizontal ownership limit is designed to prevent." Reconsideration Comments at 5. Again, Viacom's previous filings in this proceeding suggest the opposite.

For example, Viacom now claims that the leased access provisions are irrelevant to horizontal ownership limits because "there is little or no factual support for the argument that leased access is a viable option for programming services that cannot secure carriage by the largest cable operators on fair and reasonable terms." Id. Yet,

when it was seeking to dissuade the Commission from adopting a 20 percent channel occupancy limit, Viacom had a decidedly different view of the effectiveness of the leased access rules:

The leased access rules, which require a cable operator to devote up to 15% of its channel capacity for leased access, will provide non-affiliated programmers with the ability to reach consumers. Because of these rules...there is no need for the avalanche of regulations already governing cable operators and programmers to be compounded by overly-restrictive channel occupancy limits.

May 12 Comments at 4.

Viacom now claims that must-carry regulations are irrelevant to the horizontal ownership limits because they require only "that the operator must commit a percentage of its available channels to broadcast stations" and do not affect the operator's purported "power to put a programming service out of business if the service cannot compete without meaningful access to the operator's subscribers." Reconsideration Comments at 5. However, Viacom previously argued that it would be "perverse" to ignore the fact that must-carry, PEG and leased access requirements "result in substantial diversity to consumers and provide competition to program services affiliated with the cable operator." February 9 Comments at 14 (emphasis added).

Finally, Viacom now claims that "it is unlikely that the FCC's Rules implementing Section 12 will meaningfully deter anticompetitive conduct by the largest cable operators against non-affiliated programming services" and that the "program access rules implementing Section 19 are similarly

unavailing." Reconsideration Comments at 6. Yet, Viacom previously cited Sections 12 and 19 as "overlapping regulations aimed at achieving the same Congressional purposes" of promoting competition and diversity, obviating the "need for overly restrictive channel occupancy regulations." February 9 Comments at 13-14.⁵ Thus, Viacom urged the Commission to view these regulations as "part of a larger Congressionally-mandated scheme" to promote these goals. Id.

The Commission properly concluded that the 30 percent ownership limit was particularly appropriate "when coupled with the behavioral restrictions contained in Sections 12 and 19 of the 1992 Cable Act," along with the must-carry provisions of Sections 4 and 5 of the 1992 Cable Act, the channel occupancy limits and other regulatory restraints. Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, ____ FCC Rcd. ____, 73 R.R.2d 1401 (1993) ("Second Report and Order"), at ¶26. Because the

⁵ Viacom attempts to avoid the effect of its prior representations regarding Section 12 by claiming now that "it is not realistic for the FCC to assume that in most cases programming services will bring Section 12 complaints against the largest cable operators, who are their biggest customers and are thus essential to their success." Reconsideration Comments at 6. In fact, Viacom claims that it was afraid to address the horizontal ownership issues in this proceeding for the same reason. Id. at 6 n.6. Thus, Viacom would have the Commission believe that it was too timid to file comments on the horizontal ownership issues and would be too timid to file a Section 12 complaint before the Commission. Yet, it was able to muster up the gumption to file yet another federal antitrust suit -- this time against TCI, Liberty Media, QVC Network, Inc. ("QVC"), Encore Media Corporation, and others. Thus, Viacom's own behavior reveals just how untenable this attempt to justify its prior position and silence really is.

"cumulative effect" of these regulations was sufficient to protect against the exertion of "undue power that could prevent the success of new video programming services," more restrictive horizontal ownership limits are unnecessary and might impede efforts by cable operators "to expand their system ownership and avail themselves of any efficiencies and other benefits which might be gained through increased ownership." Id. The Commission's findings are consistent with and supported not only by Viacom's prior comments, but also by the remainder of the record in this proceeding.

B. The Commission Did Not Rely Solely On
The Legislative History In Adopting The
Horizontal Limits.

Like CME/CFA, Viacom claims that the Commission placed too much emphasis on the "language from the Senate Report on the subject of divestiture" in establishing the horizontal ownership limits. Reconsideration Comments at 7. However, Viacom simply ignores the fact that the Commission expressly rejected lower limits which would have required divestiture -- not simply because of its interpretation of the legislative history of Section 11 -- but rather because there was no evidence to support such drastic measures:

[W]e determined that in the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse affect on diversity, existing arrangements should not be disrupted. Based on our review and consideration of the record, we are persuaded that such divestiture is unnecessary.

Second Report & Order at ¶27 (emphasis added).

Consistent with the Congressional intent reflected in the Senate Report, the Commission examined the evidence presented in four sets of comments submitted in the proceeding and determined that the 30 percent limit "strikes the proper balance" between the "two competing concerns raised by Congress." Id. at ¶25. Specifically, the Commission concluded that the 30 percent ownership limit would "enable cable operators to avail themselves of the benefits and efficiencies of horizontal concentration and may provide an incentive for MSO investment in upgraded technology and infrastructure," while at the same time preventing "cable operators from creating barriers to the entry of new video programmers." Id. at ¶27.

The Commission's conclusion is fully supported by the record:

- Commenters recited the benefits to consumers and programmers of multiple cable system ownership. See, e.g., Liberty Media Reply Comments, filed May 12, 1993, at 7-11 (summarizing administrative and operating efficiencies, new program development, and other benefits identified by commenting parties resulting from multiple cable system ownership).
- No programmer claimed in comments submitted to the Commission that any cable operator has exercised horizontal market power.
- No commenter introduced any empirical evidence of the exercise of such market power.
- Commenters identified numerous programmers that have far fewer than half the total number of cable subscribers. See infra at 13.
- The only economic analysis of the horizontal ownership issues, which was not disputed by any party to the rulemaking proceeding, concluded that increased horizontal concentration results in "effi-

ciencies both in program acquisition and in planning and developing new technologies and services" and that neither current levels of horizontal concentration nor an increase in that concentration "pose a substantial threat of increased market power and reduced program diversity." Stanley M. Besen, et al., "An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions," Feb. 9, 1993, at 1-2, submitted as an attachment to the Comments of Telecommunications, Inc., filed Feb. 9, 1993.

Absent any record evidence that existing levels of ownership concentration had adversely affected programmers, the Commission determined that ownership limits which would freeze or reduce existing ownership levels were unjustifiable. Viacom has provided nothing to warrant reconsideration of that determination.

Thus, the Commission dutifully considered the record evidence, balanced the competing interests identified by Congress, and weighed the effects of its existing regulations in attempting to establish appropriate horizontal ownership limits for the cable industry. Contrary to Viacom's suggestion, "the driving factor" behind the Commission's decision was not blind reliance on the divestiture language of the Senate Report, but rather the weight of the record evidence.

C. The "Facts" Belatedly Presented By Viacom Are Contradicted By Substantial Record Evidence.

Finally, Viacom attempts to justify its proposed 15 percent horizontal ownership limits by citing unsupported "facts" regarding the economics of national programming services and allegations contained in its antitrust action

against TCI, Liberty Media, QVC and others. Reconsideration Comments at 8-14. Specifically, Viacom now claims that lower horizontal ownership limits are necessary because:

It is well settled that a national programming service cannot successfully launch and operate unless it is able to reach a "critical mass" of cable subscribers through which it can generate sufficient advertising revenues and/or subscriber fees. In the case of national advertiser-supported basic programming services such as Viacom's MTV or Nickelodeon, Viacom's experience, confirmed by the experience of other advertiser-supported basic cable networks, has shown that the "critical mass" of subscribers required to succeed is roughly 40 million of the approximately 57 million cable subscribers in the United States.

Id. at 8.⁶ Despite having no fewer than four opportunities to comment over a period of at least eight months, Viacom has provided no evidence of any kind regarding the costs, advertising revenues, or subscriber revenues of MTV and Nickelodeon which might enable evaluation of the claim that 40 million subscribers are needed for those services to survive.⁷

⁶ Viacom conveniently ignores subscribers available through alternative distribution technologies such as SMATV, MMDS and HSD. However, Viacom previously stated that its "aggressive marketing efforts" to these technologies "have achieved impressive results" such that approximately 12 percent of the combined subscriber base to Showtime and The Movie Channel, for example, are provided through such technologies. Viacom Comments in MM Docket No. 92-265, filed Jan. 25, 1993, at 9. Further, Viacom has announced distribution agreements with United States Satellite Broadcasting Company, Inc. for its programming services. Viacom Reply Comments in MM Docket No. 93-25, filed July 14, 1993, at 1.

⁷ Viacom's assertions merely restate the self-serving testimony of Sumner M. Redstone, Viacom's Chairman, before the Senate Subcommittee on Antitrust, Monopolies and Business Rights, Committee on the Judiciary at 4 (Oct. 27, 1993), which was quoted in the CME/CFA Petition for Reconsideration. They present nothing new.

However, the evidence in this proceeding plainly demonstrates that substantial numbers of existing national basic cable services have survived and prospered with far fewer than 40 million subscribers. See Liberty Media's Opposition to Petition for Reconsideration, filed Feb. 14, 1994, at 11. Indeed, the majority of existing national basic cable programming services serve fewer than 40 million subscribers. See CableVision, Dec. 6, 1993, at 106 (46 of the 68 listed national basic cable networks had fewer than 40 million subscribers).

In short, Viacom did not present any evidence or argument during the course of the Commission's rulemaking proceeding to suggest that horizontal ownership limits of any kind were warranted. The "evidence" Viacom now presents to justify its draconian limits is unsupported by any factual data and is directly contradicted by the record evidence in this proceeding. Consequently, the Commission should reject Viacom's belated effort to impose overly restrictive ownership limits on other cable operators.


Conclusion

Viacom's Reconsideration Comments offer nothing to support its new-found interest in draconian horizontal ownership and channel occupancy limits which it previously charac-

terized as unnecessary and anticompetitive. Consequently,
Viacom's request for reconsideration should be denied.

February 24, 1994

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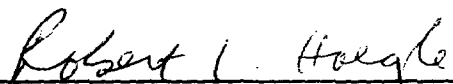
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply of Liberty Media Corporation" was served this 24th day of February, 1994 by first-class mail, postage prepaid, upon the following:

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